SIM CIAN HUA v. PP

HIGH COURT MALAYA, MELAKA
ANSELM CHARLES FERNANDIS J
[CRIMINAL APPEAL NO: MA-42S-7-08-2020]
15 FEBRUARY 2022

Abstract – *For photocopied or other computer-generated documents, they must be adduced together with certificate under s. 90A(2) of the Evidence Act 1950. Failure to adhere to such requirement will render the documents documentary hearsay and inadmissible as evidence.*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Charges under s. 408 of Penal Code for criminal breach of trust – Prosecution tendered photocopied documents to prove accused's alleged criminal breach of trust – Photocopied documents adduced without certificate under s. 90A(2) of Evidence Act 1950 ('certificate') – Whether certificate properly admitted as evidence – Whether photocopied documents documentary hearsay and inadmissible as evidence*

EVIDENCE: *Documentary evidence – Admissibility – Computer-generated document – Prosecution tendered photocopied documents to prove accused's alleged criminal breach of trust – Photocopied documents tendered without certificate under s. 90A(2) of Evidence Act 1950 ('certificate') – Whether certificate properly admitted as evidence – Whether photocopied documents documentary hearsay and inadmissible as evidence – Evidence Act 1950, s. 90A*

The accused was a clerk employed by Syarikat Jing Kong Development (M) Sdn Bhd ('Jing Kong'). Among the duties of the accused were to deal with Jing Kong's incoming and outgoing money transactions, preparation of financial statements, preparation of vouchers and cheques, management of the employees' salaries and making of the necessary payments to the KWSP (Employees' Provident Fund), LHDN (Inland Revenue Board) and PERKESO (Social Security Organisation) ('relevant agencies'). At the Sessions Court, the accused was arraigned with three charges under s. 408 of the Penal Code ('PC') for the offences of criminal breach of trust by a clerk. The charges were for misusing Jing Kong's money, where the first charge was for transferring the amount of RM14,880.55, which was meant to be paid to the relevant agencies, to the accused's own bank account *via* cheque P11. The second charge was for transferring the amount of RM100,000, which was meant to be paid to Syarikat Chuan Huat Industrial Marketing Sdn Bhd ('Chuan Huat'), to the accused's own bank account *via* cheque P8A. Meanwhile, in respect of the third charge, it was for transferring the amount of RM31,500.94, which was meant to be paid to Chuan Huat, to the accused's former employer, Syarikat Island Paradise Travel & Tour Sdn Bhd ('Island Paradise') *via* cheque P8B. During the prosecution's case, in proving the first charge, the prosecution adduced three letters, P17, P18

and P19, each from the relevant agencies ('three letters') to prove that the accused had not effected the payment of RM14,880.55 to the relevant agencies. For the second charge, a bank statement marked as P6 was tendered to show that RM100,000 had been deposited into the accused's own bank account. Reliance was also put on the evidence of SP10 who stated that she had seen the original cheque P8A and that from the information at the back of the same which stated that the cheque had been deposited into the accused's own bank account. For the third charge, the prosecution had referred to the evidence of SP6, who testified that it was the accused herself who had prepared the cheque P8B and transferred the amount of RM31,500.94 to the Island Paradise's bank account. The Sessions Court Judge, after the end of the defence's case, found the accused guilty of all the three charges. The accused was sentenced to a one-year imprisonment and a fine of RM6,000, in default two months' imprisonment for the first charge. Whereas for the second charge, the accused was sentenced to three years' imprisonment together with a fine of RM21,000, in default seven months' imprisonment. Regarding the third charge, the sentence meted was two years' imprisonment with a fine of RM9,000, in default three months' imprisonment. Hence, the present appeal.

Held (setting aside conviction and sentence for first and second charges; setting aside fine sentence of RM9,000 for third charge):

(1) To prove that the relevant agencies did not receive the payments due to them, three letters were produced during the trial. However, the three letters did not have any signature on them. Only the photocopied version of them were tendered as evidence. The identity of the three letters' makers was not in evidence, and the same were never called to give evidence. Further, the three letters tendered during the trial were computer-generated. Being computer-generated documents, s. 90A of the Evidence Act 1950 ('EA') was applicable. However, no certificate under s. 90A(2) of the same Act was ever produced during the trial. Neither was the relevant person from the relevant agencies 'responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used' was called to give oral evidence in relation to the letters. As such, the three letters were documentary hearsay and therefore inadmissible. (paras 12-19)

(2) Although there was no objection by the accused at the time the three letters were produced as to the facts as stated therein, the failure does not make it admissible. Other than that, s. 73AA of the EA was not applicable to the admission of the facts stated therein as there was nothing in the notes of evidence which stated that there was an agreement between the parties as to the admissibility of the same. Further, considering that the three letters were the only evidence

tendered by the prosecution to prove the first charge, the prosecution had failed to prove an important element of the offence under s. 408 of the PC. Hence, defence ought not to have been called in respect of the first charge. The conviction and sentence imposed by the SJ for the first charge was therefore set aside, and the accused was acquitted and discharged. (paras 20-27)

(3) As the bank statement P6 was a computer-generated document, the prosecution had decided to produce the 'Perakuan Di Bawah Seksyen 90(A) Akta Keterangan' ('perakuan'). The said perakuan was marked as 'ID7', and it was only produced to be identified and not made part of the evidence. From the evidential point, P6 *per se* was inadmissible, unless the conditions in s. 90A of the EA were satisfied. As the prosecution had elected to introduce ID7, it was incumbent upon the prosecution to ensure that it formed part of the evidence. However, since ID7 had not been properly admitted, the bank statement P6 remained inadmissible. (paras 30, 31 & 34)

(4) On perusing cheque P8A as well as the actual exhibit tendered, the information written at the back of cheque P8A was inadmissible because the cheque itself was a photocopy and not original. There was no explanation why the original cheque was not produced. Further, the information was handwritten, and no evidence was adduced as to who wrote the information down. Thus, the fact that the accused had deposited and misappropriated the amount of RM100,000 to her own bank account was not proven. Defence should not have been called in respect of the second charge. The appeal against the second charge was therefore allowed, and the conviction and sentence imposed by the SJ for the second charge was set aside. (paras 36-38)

(5) SP6 in her evidence stated that it was the accused who deposited the cheque P8B. She received the cheque deposit receipt P16 from the accused herself. She confirmed that the accused deposited the sum of RM31,500.94 into the bank account of Island Paradise *via* cheque P8B. The reason for the payment was because the accused owed money from her former employer. Considering this and the finding that the accused's defence, that the accused claimed that she had no knowledge of cheque P8B or why it was paid to the bank account of Island Paradise, was a bare denial, the accused's defence could not stand in light of the evidence, especially of SP6. Hence, from the evidence adduced, the court was satisfied that the conviction in respect of the third charge was safe. The conviction and the sentence of imprisonment of two years were therefore maintained. However, the sentence of fine of RM9,000 was set aside. (paras 43-46)

Case(s) referred to:
Allied Bank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***
Associated Pan Malaysia Cement Sdn Bhd v. Westwood Development Sdn Bhd [2013] 10 CLJ 95 HC ***(refd)***
Jupiter Securities Sdn Bhd lwn. Amal @ Nur Amal Abdul Manaf [2001] 1 LNS 294 HC ***(refd)***
Mustakim Chek Man v. PP [2010] 6 CLJ 256 CA ***(refd)***
Noliana Sulaiman v. PP [2001] 1 CLJ 36 HC ***(refd)***
PP v. Datuk Hj Harun Hj Idris & Ors [1977] 1 LNS 92 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Tan Kok An [1996] 2 CLJ 96 HC ***(refd)***
PP v. Tai Mei Yuen [1990] 1 CLJ 1208; [1990] 2 CLJ (Rep) 826 HC ***(refd)***
Puganeswaran Ganesan & Ors v. PP & Other Appeals [2020] 9 CLJ 326 FC ***(refd)***
Soo Kian Huat lwn. Soo Bee Choo [2016] 1 LNS 1069 HC ***(refd)***
Woolmington v. DPP [1935] 1 AC 462 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 283(1)(c), 402C
Evidence Act 1950, ss. 73AA, 90A(2), (4),
Penal Code, s. 408

For the appellant - M/s Emirul Sarifudin & Co
For the respondents - DPP; State Legal Adviser, Melaka

Reported by Syamim Ariffin

JUDGMENT

Anselm Charles Fernandis J:

Introduction

[1] The following charges had been preferred against the accused under s. 408 of the Penal Code:

> Pertuduhan Pertama:
>
> Bahawa kamu pada 05 September 2018, bertempat di Syarikat Jing Kong Development (M) Sdn Bhd, Lot 158 161, Mukim Durian Tunggal, Alor Gajah, Melaka, di dalam Daerah Alor Gajah, dalam Negeri Melaka, sebagai kerani akaun telah melakukan pecah amanah dengan mengeluarkan cek UOB Bank No: 677356 atas akaun UOB No: 1453045373 milik kamu berjumlah RM14,880.55/- untuk tujuan pembayaran KWSP, PERKESO dan LHDN bagi bulan September 2018 yang telah diamanahkan kepada kamu di mana dengan curangnya menyalahgunakan harta tersebut dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 408 Kanun Keseksaan dan boleh dihukum di bawah Akta yang sama.

Pertuduhan Kedua:

Bahawa kamu pada tarikh 28 September 2018, bertempat di Syarikat Jing Kong Development (M) Sdn Bhd, Lot 158-161, Mukim Durian Tunggal, Alor Gajah, Melaka, di dalam Daerah Alor Gajah, dalam Negeri Melaka sebagai kerani akaun telah melakukan pecah amanah dengan mengeluarkan cek UOB Bank No: 677410 atas akaun Public Bank No: 4684779609 milik kamu berjumlah RM100,000.00/ untuk tujuan pembayaran ke atas Syarikat Chuan Huat Industrial Merketing Sdn Bhd dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 408 Kanun Keseksaan dan boleh dihukum di bawah Akta yang sama.

Pertuduhan Ketiga:

Bahawa kamu pada tarikh 04 Oktober 2018, bertempat di Syarikat Jing Kong Development (M) Sdn Bhd, Lot 158-161, Mukim Durian Tunggal, Alor Gajah, Melaka, di 62-16-11/2018 dalam Daerah Alor Gajah, dalam Negeri Melaka sebagai kerani akaun telah melakukan pecah amanah dengan mengeluarkan cek UOB Bank No: 677427 atas akaun Public Bank No: 3141269928 milik Syarikat Island Paradise Travel & Tour Sdn Bhd berjumlah RM31,500.94/- untuk tujuan pembayaran ke atas Syarikat Chuan Huat Industrial Merketing Sdn Bhd dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 408 Kanun Keseksaan dan boleh dihukum di bawah Akta yang sama.

At The Sessions Court

[2] The prosecution had called a total of 11 witnesses. At the end of the prosecution case, the learned Sessions Court Judge (SCJ) had called for the accused to enter defence for all the charges.

[3] The accused was the only witness for the defence. At the end of the defence case, she was found guilty of all three charges and sentenced accordingly.

[4] For the first charge, the accused was sentenced to one year imprisonment and was fined RM6,000 in default two months' imprisonment. For the second charge, the accused was sentenced to three years' imprisonment and fined RM21,000 in default seven months' imprisonment. As for the third charge, the accused was sentenced to imprisonment for two years and fined RM9,000 in default three months' imprisonment. The imprisonment sentences were made to run concurrently from the date of sentence.

[5] The accused appealed against the conviction and sentence imposed by the Sessions Court on each of the three charges.

[6] After hearing the appeal this court decided to allow the accused's appeal in respect of the first and second charge. This court dismissed the appellants appeal against the third charge. In respect of the third charge this court set aside the sentence imposed by the Sessions Court and imposed a sentence of two years' imprisonment instead.

[7] Hence, this appeal by the prosecution against the acquittal and discharge in the first and second charge and the sentence in the third charge. The accused appealed against the conviction and sentence in respect of the third charge. This judgment is in respect of both appeals. The parties will be referred to as they were in the Sessions Court.

Brief Facts

[8] The evidence adduced disclosed that the accused was at all material times employed as a clerk at Syarikat Jing Kong Development (M) Sdn Bhd (the company). Among her duties was to deal with incoming and outgoing money transactions of the company, prepare the financial statements of the company, prepare vouchers and cheques, manage the salaries of company employees and make the necessary payments to the KWSP, LHDN and PERKESO (the relevant agencies).

[9] It was the prosecution's case that the accused had caused the issuance of three cheques (P11, P8A and P8B) belonging to the company in relation to each charge respectively.

[10] The first cheque was UOB Bank No. 677356 for RM14,880.55 (P11). This cheque was made in the name of the accused herself and was deposited into her own account no. 1433045373 at UOB Bank. SP4 gave evidence that it was the practice of the company to pay monies due to the relevant agencies through the accused's account. The sum of RM14,880.55 was to be used by the accused for the payment to these the agencies for the month of September 2018. The cheque was signed by SP8 who was one of the directors of the company.

[11] To show that P11 was issued for the purpose of payment to the relevant agencies four payment vouchers were exhibited specifically P13A was for payment to KWSP, P13B and P13C was for payment to PERKESO and P13D was payment to LHDN.

[12] To prove that the relevant agencies did not receive the payments due to them, three letters each from KWSP dated 18 March 2019 (P17), PERKESO dated 14 March 2019 (P18) and LHDN dated 29 April 2019 (P19) were produced during the trial. P17, P18 and P19 are collectively referred to in this judgment as "the letters".

[13] The SCJ had relied on the letters to come to the conclusion that the accused failed to pay the relevant agencies the RM14,880.55 entrusted to her. This is clear from his judgment at para. 23 p. 13 of Jilid 1 of the Rekod Rayuan:

> [23] Untuk membuktikan bahawa OKT telah gagal membuat bayaran-bayaran tersebut seperti yang diamanahkan, pihak pendakwaan telah mengemukakan Eksibit P17 (Notis daripada PERKESO bertarikh 14/03/2019) dan Eksibit P19 (Notis daripada LHDN bertarikh 29/4/2019) yang menunjukkan bahawa pihak pihak tersebut tidak menerima atau lewat menerima bayaran daripada Syarikat Jing Kong bagi pembayaran-pembayaran yang sepatutnya dibuat pada bulan September 2018.

[14] It is obvious on the face of the letters that they did not have any signature on them. Only photocopies and not originals of the letters were tendered as evidence. The identity of the maker of each of the letters was not in evidence nor were the makers ever called to give evidence. In *Allied Bank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33 Augustine Paul J (as His Lordship then was) stated clearly that:

> It is settled law that where a document is sought to be proved in order to establish the truth of the facts contained in it the maker has to be called (see *R v. Gillespie* [1967] 51 Cr App R 172; *R v. Plumer* [1814] R & R 264; *Hill v. Baxter* [1958] 1 QB 271; *R v. Moghal* [1977] Crim LR 373). Non-compliance with this rule will result in the contents of the documents being hearsay.

[15] Further, I find that the letters tendered during the trial are copies of documents which were computer-generated. The copy from LHDN (P19) expressly stated that it was a computer-generated document and that a signature was not required. So also the copy of the PERKESO (P18). As for the letter from KWSP (P17), I find that it too is a computer-generated document having the words "KWSP 1195" and "Salinan Cetakan myEPF" at the top right corner. As these were computer-generated documents then s. 90A of the Evidence Act 1950 would apply. Section 90A is an exception to the hearsay rule.

[16] For the sake of convenience, I reproduce s. 90(A) herein:

> Admissibility of documents produced by computers, and of statements contained therein
>
> (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.
>
> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

A (3) (a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.

(b) A certificate given under subsection (2) shall be admissible in evidence as *prima facie* proof of all matters stated in it without proof of signature
B of the person who gave the certificate.

(4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

C (5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

(6) A document produced by a computer, or a statement contained in such
D document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry, in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

E (7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence
F being a person who was:

(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

(b) in any manner or to any extent involved, directly or indirectly,
G in the production of the document by the computer.

[17] No certificate under s. 90A(2) was produced during trial with regards to the letters.

[18] Neither was the relevant person from KWSP, PERKESO or LHDN
H "responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used" was called to give oral evidence that:

(i) the letters were produced by a computer, and

(ii) was in good working order and was operating properly in all respects
I throughout the material part of the period during which the document was produced.

[19] It is therefore my finding that the letters P17, P18 and P19 are documentary hearsay and therefore inadmissible as they did not comply with the provisions of s. 90A of the Evidence Act 1950 . A

[20] I had also considered the contention that as there was no objection by counsel for the accused at the time the letters were produced these letters were admissible as to the facts contained in them. In other words, that the accused is deemed to have admitted to the fact that the monies which were supposed to be paid to the agencies were in fact never paid to them. B

[21] It is trite that failure of the defence to challenge the admissibility of a document does not make it admissible. This proposition had been succinctly explained in *Mustakim Chek Man v. PP* [2010] 6 CLJ 256 by the Court of Appeal stated as follows: C

> [13] The learned trial judge made it a point to stress that the admission of P29 was not objected by the defence (see 99NP and 108NP). But inadmissible evidence "does not become admissible by reason of failure to object" (*Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 per Edgar Joseph Jr FCJ and cited by the Federal Court in *Chan King Yu v. PP* [2009] 1 CLJ 601; [2008] 1 LNS 573. "It is the duty of the court to disallow all inadmissible evidence even though no objection is taken to its admissibility. Inadmissible evidence remains inadmissible. It cannot be rendered admissible by failure of counsel to object to it" (*Goh Beng Seng v. Dol Dolah* [1969] 1 LNS 46 per Sharma J). *"Any admission of inadmissible evidence, even with consent or by waiver of the accused was wrongful and such inadmissible evidence remained inadmissible evidence, the effect of which was open to any court to assess"* (*Ooi Lean Chai v. PP* [1991] 1 CLJ (Rep) 337; [1991] 2 CLJ 1304 per Mohammed Azmi SCJ). And since the alleged information could not be admitted, then the evidence of the actions of the accused in taking out the Microsoft bag and the red plastic packet were of little value (see *Sandra Margaret Birch v. PP* [1977] 1 LNS 114, cited with approval in *Hasamuddin Talena v. PP supra*). (emphasis added) D E F

See also: *PP v. Tan Kok An* [1996] 2 CLJ 96; [1996] 1 MLJ 89; *Noliana Sulaiman v. PP* [2001] 1 CLJ 36; [2000] 4 MLJ 760. G

[22] I am also aware of s. 73AA of the EA 1950 which reads as follows:

> 73AA Admissibility of fact in criminal cases, *etc*
>
> Notwithstanding anything contained in this Chapter and subject to the Criminal Procedure Code [Act 593], in any criminal proceedings, no fact whether oral or written need be proved which the parties to the proceedings **have agreed to admit** at the trial or which the parties to the proceedings have agreed to admit before the trial in writing.
>
> (emphasis added) H

[23] It is my view is that s. 73AA of the EA 1950 does not apply to the admission of the facts stated in the letters as there is nothing in the notes of evidence that there was an agreement between the parties as to the admissibility of these letters. I

[24] In this respect s. 73AA Evidence Act 1950 expressly state that the section is subject to the Criminal Procedure Code. In this respect s. 73AA must be read in the light of s. 402C.

[25] Section 402C of the Code states:

> (1) Notwithstanding any other written law, and subject to the provisions of this section, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the Public Prosecutor or accused and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.
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> (2) An admission under this section:
>
> (a) may be made before or during the proceedings and shall be in writing and signed by both parties;
>
> (b) if made otherwise than in the Court, shall be in writing;
>
> (c) if made in writing by an individual, shall be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk, or some other similar officer of the body corporate;
>
> (d) if made on behalf of an accused who is an individual, shall be made by his advocate
>
> (e) if made at any stage before the trial by an accused who is an individual, shall be approved by his advocate (whether at the time it was made or subsequently) before or during the proceedings in question.

[26] These letters were the only evidence tendered to show that the RM14,880.55 entrusted to the accused for payment to KWSP, PERKESO and LHDN was not paid to these agencies and therefore the accused had misappropriated the money. It is therefore an important element of the offence in s. 408 of the Penal Code which had not been established. I am of the view that defence ought not to have been called in respect of the first charge.

[27] I therefore set aside the conviction and sentence imposed by the SCJ in respect of the first charge and acquit and discharge the accused.

[28] The second charge concerns UOB Bank cheque No: 677410 (P8A) belonging to the company. The cheque was for the sum of RM100,000.

[29] In respect of the second charge, it was the prosecution case that the accused had caused a voucher no. 01774 to be prepared containing false details that the payment was for a company called "Syarikat Chuan Huat" (see P12). The cheque which was prepared by the accused in relation to P12

was however not made out to Syarikat Chuan Huat but made to the accused herself. The cheque was marked P8A. The cheque was later deposited into the Public Bank account no. 4684779609 said to belong to the accused. The bank statement was produced by SP3 during the trial and marked P6 purporting to show that RM100,000 had been deposited into the Public Bank account of the accused.

[30] As P6 is a computer-generated document the prosecution decided to produce the "Perakuan Di Bawah Seksyen 90(A) Akta Keterangan" to prove that the bank statement P6 was produced by a computer in the course of its ordinary use as well as to invoke the presumption that the computer was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced. See s. 90A(4) of the Evidence Act 1950.

[31] The Perakuan 90(A) was marked "ID7". (See p. 9 Rekod Rayuan Jilid 2 and p. 65 Rekod Rayuan Jilid 3). It was only produced to be identified and not made part of the evidence.

[32] The importance of ensuring an exhibit be made part of the evidence had been emphasised in the case of *PP v. Datuk Hj Harun Hj Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180. In that case the evidential effect of a document which has not been properly proved was described by Abdoolcader J (as he then was) in at p. 183 in the following terse terms:

> It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot form part of the record in this case, namely, D41 and D43 which were both put in for identification only and which are the audited accounts and annual report of the bank for the years 1973 74 and 1972 respectively. As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto.

[33] Again in the case of *Associated Pan Malaysia Cement Sdn Bhd v. Westwood Development Sdn Bhd* [2013] 10 CLJ 95 the High Court made the following findings.

> [34] In any event, the defendant's survey plan remained an ID document, being marked as "IDD-14". An ID document is not a document that has been properly admitted as evidence at trial. It is trite that such documents do not form part of the evidence for the court's consideration and any evidence or testimony in regards to these document are to be disregarded.

See also: *Jupiter Securities Sdn Bhd lwn. Amal @ Nur Amal Abdul Manaf* [2001] 1 LNS 294; *Soo Kian Huat lwn. Soo Bee Choo* [2016] 1 LNS 1069.

[34] I am of the view that from the evidential point, P6 *per se* is inadmissible. This is so unless the conditions in s. 90A are satisfied. As the prosecution had elected to introduce a certificate in the form of ID7 under s. 90A(2) it is incumbent on the prosecution to ensure that it forms part of the evidence. As ID7 had not been properly admitted P6 remains inadmissible. In saying so, I am reminded of the fact that the burden to prove the case beyond any reasonable doubt, subject to any exception to the rule, rests with the prosecution throughout and does not shift: see *Woolmington v. DPP* [1935] 1 AC 462, *Puganeswaran Ganesan & Ors v. PP & Other Appeals* [2020] 9 CLJ 326. It is also trite that the accused is "perfectly entitled to take advantage of any frailty which appeared in the prosecution case". see *PP v. Tai Mei Yuen* [1990] 1 CLJ 1208; [1990] 2 CLJ (Rep) 826.

[35] I had also considered whether there was any other evidence apart from P6 to indicate that the cheque P8A had been deposited into the account of the accused. The company's UOB bank statement P20 on the face of it does not indicate that P8A had been deposited into the account of the accused. Reference is also made to the evidence of SP10, the operations manager of UOB Malim Branch, Melaka. During re-examination, she stated that she had seen the original of P8A and that the from the information at the back of the cheque it was stated that P8A was deposited into the Public Bank account of the accused. I reproduce the relevant part of her evidence herein:

Pemeriksaan Semula:

Rujuk P20

S: Peguam ada tanya mengenal cek samada cek ditunjuk kepada kamu atau tidak, tapi tidak ditunjuk. Selain dari cek yang ditunjuk, bagaimana kamu boleh dapat tahu mengenai kemasukan dan pengeluaran ini?

J: Walaupun tidak ditunjuk, sebelum saya datang ke sini, saya telah mendapat cek asal dan salinannya. So, daripada cek itu kami akan dapat tahu ke mana cek itu dimasukkan. Maksudnya maklumat di belakang cek itu. Dan kami juga mendapatkan cek asal daripada Public Bank melalui nombor cek yang ditunjukkan di atas penyata ini.

S: Soalan peguam juga ada menyatakan bahawa perlu tak pihak bank melihat dan buat pengesahan meljonai tandatangan samada cek tersebut adalah palsu ataupun tidak. Kamu setuju. Boleh kamu jelaskan?

J: Tidak semestinya kami buat pengesahan dengan pemegang akaun atau yang tandatangan Untuk syarikat, pihak bank akan bagi kepada syarikat 1 form di mana penandatangan memberi kuasa kepada orang pihak ketiga sebagai orag yang boleh buat pengesahan. Contohnya Jing Kong Development, dia boleh bagi kepada orang lain untuk buat pengesahan, tak semestinya yang penama tandatangan yang 3 itu.

[36] On perusing P8A at p. 66 of Rekod Rayuan Jilid 3 as well as the actual exhibit tendered in court, I am of the view that the information written at the back of P8A is inadmissible because P8A itself is a photocopy and not the original of the cheque. There was no explanation why the original cheque was not produced in court. Further, the information was handwritten and no evidence was adduced as to who wrote the information down.

[37] Based on the evidence presented, I find that the fact that the sum of RM100,000 had been deposited into her Public Bank account and misappropriated by her had not been proven. That being the case, I am of the view defence should not have been called in respect of the second charge.

[38] I therefore allowed the accused's appeal against the second charge and set aside the conviction and sentence imposed by the SCJ.

[39] In respect of the third cheque relating to the third charge, the accused was said to have prepared the company UOB cheque no 677427 dated 4 October 2018 (P8B) for payment of the sum of RM31,500.94 to Syarikat Chuan Huat. A voucher was prepared to this effect and marked as P12. SP4 a director of the company and SP5, a representative of Syarikat Chuan Huat evinced that Syarikat Chuan Huat and the company did not have any dealings with each other at the material time. According to SP4, he also had never heard of Island Paradise Travel and Tour. This was also confirmed by SP7, the company's present accounts clerk. SP4 also confirmed that he had never issued cheque no. 677427.

[40] It is shown in the UOB statement of account of the company (P20) had been debited the sum of RM31,500.94. It also clearly showed that this was done *via* cheque withdrawal 677427. A s. 90A certificate in respect of P20 was produced and properly marked as P24.

[41] P8B was never deposited into the account of Syarikat Chuan Huat. According to SP2, an officer from Public Bank P8B was deposited into the account no: 3141269928 belonging to Island Paradise Travel and Tour Sdn Bhd. It was clearly stated in the statement of account that the sum RM31,500.94 was paid *via* cheque no. 677427. The statement of account from Public Bank dated 31 October 2018 was tendered under s. 90A of the EA was marked P3. The certificate under s. 90A in respect of this account was tendered as P4.

[42] SP6 worked as a clerk at Island Paradise Travel and Tour Sdn Bhd. She confirmed that the accused was formerly employed there. She knew the accused as the accused was asked to teach SP6 about the work when SP6 initially took over the work from the accused.

[43] SP6 in her evidence stated that it was the accused herself that had deposited P8B. She had received the cheque deposit receipt (P16) from the accused herself. She confirmed that the accused had deposited the sum of

RM31,500.94 into the account of Island Paradise Travel and Tour Sdn Bhd by way of cheque no. 677427. The reason why the accused paid Island Paradise Travel and Tours the amount was because she owed money to her former employers.

[44] I also find the accused defence to the third charge to be a mere denial. She claims no knowledge of P8B or why it was paid into the account of Island Paradise Travels and Tours. Her evidence cannot stand in the light of the evidence of SP4 and especially SP6 which clearly states that it was the accused who made the payment because the accused owed money to Island Paradise Travel and Tours.

[45] From the evidence adduced both orally and by way of documents I was satisfied that the conviction of the accused in respect of the third charge was safe.

[46] I therefore maintained the conviction. As for the sentence, I maintained the imprisonment term of two years. I however set aside the fine of RM9,000.

[47] In considering the sentence to be imposed in respect of the third charge I am guided by the principles set out in the case *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 where Hashim Yeop Sani J (as His Lordship then was) stated:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v. Kenneth John Ball* 35 Cr. App. R 164 as follows:
>
> > In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe.

[48] I am of the view that a sentence of two years' imprisonment is appropriate as well as satisfies the element of public interest.

[49] I also considered the mitigating factors presented in the Sessions Court. It was stated that the accused was unemployed and was doing some online business of which her income was uncertain. There was no indication that her position had changed. Even if the court were to impose a sentence of fine, the possibility was high it would not be paid, the court would have no alternative but to impose a period of default term of imprisonment pursuant to s. 283(1)(c) of the CPC. Thus, invariably, she would have to face incarceration which would be inappropriate in the circumstances bearing in mind she is suffering from diabetes and high blood pressure.

Conclusion

[50] In the upshot, I allow the accused appeal in respect of the first and second charge and order that she be acquitted and discharged for these charges. I affirm the conviction of the SCJ in respect of the third charge but allow the appeal on the sentence and reduce it to two years' imprisonment to begin from today.